

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 20, 2006

MARTIN E. WALKER v. HOWARD CARLTON, WARDEN

Appeal from the Criminal Court for Johnson County
No. 4900 Lynn W. Brown, Judge

No. E2006-01584-CCA-R3-HC - Filed September 7, 2007

The petitioner appeals from the Johnson County Criminal Court's denying him habeas corpus relief from his 1986 second degree murder conviction and resulting sentence of not less than nor more than twenty-five years. The petitioner essentially contends that the trial court was without jurisdiction (1) to accept his plea and to sentence him without counsel present, (2) to sentence him without designating a release eligibility percentage, and (3) to sentence him under Class X sentencing which had been abolished prior to the sentencing. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Martin E. Walker, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; and Anthony Wade Clark, District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was indicted in 1984 on two counts of first degree murder of his wife and his father in 1980. The cases were severed, and a jury convicted him in 1985 of first degree murder of his father, for which he is serving a life sentence. In 1986, the petitioner pled guilty to second degree murder for killing his wife in 1980. He was sentenced to not less than nor more than twenty-five years, which was to be served consecutively to his life sentence.

The petitioner has previously made several collateral attacks in the state courts and one in federal court. In the present case, the petitioner sought habeas corpus relief claiming that he was sentenced without the assistance of and in the absence of counsel, who, he claims, had left the courtroom. The trial court summarily dismissed the petition for habeas corpus relief, finding that

nothing alleged by the petitioner would support a finding that the petitioner's conviction was void or that his sentence had expired.

First, the state contends that the petitioner's issue is not ripe for review because he challenges his twenty-five-year sentence which is to be served consecutively to his life sentence. It argues that the petitioner's claim would only ripen after the life sentence is served, citing Ussery v. Avery, 432 S.W.2d 656, 658-59 (Tenn. 1968), and State ex. rel. Dickens v. Bomar, 381 S.W.2d 287, 289 (Tenn. 1964). We note, though, that more recent supreme court cases hold that the invalidity arises at the time of entry of the judgment, and a petitioner is not foreclosed from habeas corpus relief until another sentence is served. See Hoover v. State, 215 S.W.3d 776, 778-78 (Tenn. 2007); Smith v. Lewis, 202 S.W.3d 124, 128 (Tenn. 2006). The petitioner was entitled to seek habeas corpus relief from his twenty-five-year sentence.

In this appeal, the petitioner not only contends the trial court was without jurisdiction to accept his plea and to sentence him without counsel present, but he also claims for the first time on appeal that he was illegally sentenced without designation of a release eligibility percentage and under the Class X sentencing act, which had been abolished before his sentence was imposed. The petitioner may not assert one ground in the trial court and then raise new grounds for the first time on appeal.

Relative to the petitioner's claim that he was sentenced without counsel, the transcript of the guilty plea hearing reflects that the defendant was represented by counsel during the initial plea and the initial sentencing to twenty-five years in prison as a Range I, standard offender. The petitioner was removed from the courtroom. The transcript reflects, however, that the petitioner was "brought back out" at a later time and resentenced at the request of the state to "not less than twenty-five nor more than twenty-five years" because the offense occurred before the effective date of the Sentencing Act of 1982. The trial court advised the petitioner that service of the sentence before parole eligibility would be "a little more" than the thirty percent the trial court previously told him. The petitioner said he understood and, again, pleaded guilty and was sentenced.

Relative to this second sentencing, the record is silent as to whether the petitioner's counsel was present, although the complete transcript names the petitioner's counsel on the cover page of the transcript. We cannot determine whether the petitioner's counsel was present. However, such is irrelevant to this habeas corpus proceeding. If counsel was not present, the petitioner's claim relates to his pleading guilty without the benefit of counsel in violation of the Sixth Amendment to the United State Constitution and article I, section 9 of the Tennessee Constitution. However, such a violation does not render a conviction void, only voidable through post-conviction proceedings. See, e.g., State v. Archer, 851 S.W.2d 157, 164 (Tenn. 1993). Thus, the petitioner is not entitled to relief on his claim.

At this point, we note that contrary to the state's assertion at the time of the plea, second degree murder at the time of the offense carried a sentence to prison "for life or for a period of not less than ten (10) years." T.C.A. § 39-2408 (1975). This sentence was determinate. See State v.

Williams, 575 S.W.2d 948, 949 (Tenn. 1978). In Williams, the supreme court ruled that a sentence of “not less than ten years” or one of “not less than ten years but not more than fifteen” was void for failing to comply with the “requirement of certainty of time required by the determinate sentence law.” Id. In this regard, we conclude that the defendant’s sentence is not void and satisfies the requirement of certainty of time, i.e., a sentence of twenty-five years.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE